IN THE

Supreme Court of the United States

OCTOBER TERM — 1971

No. 71-1561

ANNETTE HEYMAN, Individually;
ANNETTE HEYMAN, as Executrix of the Estate of Lazarus S. Heyman, Late of Danbury; and
PRUDENTIAL MANAGEMENT COMPANY, a Connecticut corporation,
Petitioners,

v.

ROBERT S. KLINE,
Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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PRELIMINARY NOTE

Petitioners were Plaintiffs in the United States District Court, District of Connecticut. Mrs. Heyman, one of the Petitioners, will on occasion be referred to by that name. Otherwise, Petitioners will be so referenced and Respondent will be referred to by his name, Kline.

The following references will be utilized:

Petitioners' Petition	(Pet-)
Petitioners' Appendix	(Pet.App.)
Certified Record	(R)[1]

[1] The record in this cause has been previously certified to this Court by the Petitioners. References are to particular pages of the various record documents and/or transcripts as indexed by the Clerk of the District Court.

OPINIONS BELOW

The opinions of the Court of Appeals and the District Court, District of Connecticut, are set forth in (Pet. App. B). The opinion of the Court of Appeals is reported at 456 F.2d 123 (2d Cir. 1972).

JURISDICTION

The Petitioners assert jurisdiction under 28 U.S.C. Sec. 1254(1). Kline asserts herein that by their petition, Petitioners have failed to meet the burden of Supreme Court Rule 19 in that there is no showing that the Court of Appeals has either (1) decided an important question of federal law which has not been, but should be, settled by this Court or, (2) has decided a federal question in a way in conflict with applicable decisions of this Court or other circuit courts of appeals.

CONSTITUTIONAL PROVISION

> In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no facts tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.
>
> United States Const. Amend. VII

QUESTION PRESENTED FOR REVIEW

Did the United States Circuit Court of Appeals for the Second Circuit, in rendering a decision that (1) the Respondent did not waive his right to trial by jury, and (2) Respondent was entitled to a jury trial on questions of fact common both to legal and equitable claims, decide an important question of federal law

which has not been, but should be, settled by this Court, or decide a federal question in a way in conflict with applicable decisions of this Court?

STATEMENT OF THE CASE

On February 12, 1970, Petitioners filed suit in the District of Connecticut seeking damages for Kline's breach of contract, asking for injunctive and declaratory relief to the effect that Kline had no interest in certain real estate located at Tampa, Florida. (R 30). At the same time, to bar Kline from initiating any legal proceedings against them in Florida with respect to the land, Petitioners applied for a temporary restraining order (TRO) which the District Judge (The Honorable William Timbers) signed that day. (R 31, 32). No notice of this application was given to Kline, Petitioners' counsel asserting in the application that notice should not be required because "to do so would permit the immediate and irreparable injury, loss and damage to Plaintiff Annette Heyman described in the verified Complaint. . . ."[2] The District Court determined that Kline was served that day.

On February 13, 1970, Kline filed a quiet title suit in the Circuit Court in and for Hillsborough County, Florida, alleging his 15 percent interest in the Florida real estate. (R 37, Exhibit A).

On February 20, 1970, counsel for both parties appeared before the Honorable Fred Blumenfeld, United States District Judge at Bridgeport, Connecticut. Thomas J. Dolan, Esq., appeared specially for Kline and

[2] The Statement of the Case is taken, in large part, from the opinion of the United States Court of Appeals for the Second Circuit, 456 F.2d 123, 127 *et seq.*

filed a motion to dismiss the complaint for lack of jurisdiction. (R 35). It was agreed by counsel that the ruling on that motion and the hearing on Petitioners' motion for a preliminary injunction should be postponed until February 24, when they could be heard by Judge Timbers who had issued the TRO. It was also agreed that the TRO would remain in effect until then. (R 11).

On February 24, 1970, counsel for Petitioners filed a motion charging Kline, his New York counsel and his Florida counsel, with contempt, alleging that the TRO had been violated when Kline's lawsuit was filed in Florida. (R 37). The hearing of this motion and of the other pending applications was postponed until March 3, 1970, by agreement of counsel.

On March 3, 1970, Judge Timbers heard Kline's Motion to Dismiss and later denied it. (R 45). On March 26, 1970, Kline filed his motion for a preliminary injunction. (R 48). Hearings on the motions for preliminary injunctions and for a judgment of civil contempt were postponed until March 25, 1970, Kline's counsel consenting to a continuance of the TRO.

On March 25, 1970, Judge Timbers held a reported conference with counsel in his chambers in order to schedule hearings on the motion for preliminary injunction and the motion to adjudge Kline and his attorneys in contempt. (R 14). Neither party was present, but each was represented by counsel. After some discussion, set forth in the summary of proceedings, *infra*, Judge Timbers scheduled hearings on the motions for a preliminary injunction and the motion to adjudge Kline and his attorneys in contempt. See 456 F.2d at 127. As of this hearing on March 25, the time for Kline to file

his answer to the Complaint had not elapsed and he had not filed his answer. It was agreed that (1) the answer and counterclaim would be filed by April 2, (2) the Petitioners would close pleadings by April 9, and (3) that all of the discovery would be completed by April 20. (R. 14, pp. 28-30).

On March 31, 1970, Kline filed his answer and counterclaim (R 53) seeking compensatory damages for breach of his employment contract with Annette Heyman and punitive damages for her maliciously breaching the contract and excluding him from his 15 percent interest in the Tampa land. And, on the basis of the Employment Contract and the July 16 Assignment of Option, he requested various forms of equitable relief with a view to establishing an interest in the Tampa land. Kline also claimed damages for his share (15 percent) of lease receipts emanating from a lease of the Tampa property. The answer and counterclaim were accompanied by a written demand for a jury trial. (R 53).

Petitioners then moved to strike the demand for a jury and after argument on April 20, Judge Timbers granted the motion. (R 62).

Petitioners filed their Reply to Kline's Answer, Defenses and Counterclaim, and, among other things, admitted execution and delivery of the July 16, 1968 Assignment. (R 65, pp. 5, 6).

After the District Court issued its TRO enjoining Kline from filing suit in Florida regarding the Florida property, Kline filed his Motion for Temporary Restraining Order and Preliminary Injunction enjoining Mrs. Heyman from disposing of the Florida property

until the title question was disposed of. (R 48). The District Court granted Petitioners' Motion for Preliminary Injunction and denied Kline's.

At the conclusion of the trial, the District Court granted all relief requested by Petitioners, including compensatory damages totaling $40,452.58 plus civil contempt damages of $3,744.57. However, with regard to the former figure, the court set off the sum of $13,591.62 representing Kline's payments for his 15 percent interest in the Florida property.

By its judgment, (R 99) the court ordered Kline to release his claim to the property which he did by filing a release. However, the court cited Kline and his wife for contempt because they would not jointly execute a quit claim deed to Mrs. Heyman. (R 114). Mrs. Kline was not a party and was not within the court's jurisdiction. Mrs. Heyman withdrew her motion for contempt against Kline when he *individually* executed a quit claim deed (although such was not contemplated by the judgment). Thereafter, the court held Mrs. Kline in contempt. This was reversed, there being no jurisdiction. *Heyman v. Kline,* 444 F.2d 65 (2d Cir. 1971).

The Court of Appeals reversed the judgment against Kline, including civil contempt. With regard to the latter, the court held that the District Court's issuance of the TRO was invalid. *Heyman v. Kline,* 456 F.2d 123 (2d Cir. 1972). Petitioners do not contest this holding.

Petitioners timely filed their Petition for a Writ of Certiorari.

SUMMARY OF THE PROCEEDINGS

1. The Complaint

Petitioners' summary to the extent set out in their first paragraph (Pet - 3) is accurate with regard to the claims for relief sought and the jurisdictional ground claimed.

Petitioners' Complaint (R 30) prayed for a judgment holding that Kline had no right, title or interest in the Florida property because he had breached his employment contracts with Annette Heyman in certain respects. The Complaint also claimed damages for breach of contract and expenses fraudulently incurred by Klein. The Employment Contract[3] does not purport to convey an interest in the Florida real estate to Kline. (R 53, Exhibit G).

2. Court Proceedings Setting Cause for Non-Jury Trial

Contrary to Petitioners' argumentative statement (Pet - 4), both sides did not evince an interest in securing an early date for trial. Kline had not even filed his answer, defense and counterclaim. Both sides did evince an interest in an early hearing of each application for preliminary injunction. Through his counsel, Kline advised the court that Petitioners were attempting to sell the property in question and he desired that the court enter a preliminary injunction preventing sale, thus maintaining the *status quo.* (R 48). In this regard, his counsel saw no reason why the parties could not proceed to a trial on the merits within 30 days (R 14). In response to this statement by counsel, the court

[3] The Employment Contract was not attached to the Complaint but was attached to the Answer and Counterclaim filed by Kline.

stated that he wondered if he could take up a suggestion that Mr. Dolan made, i.e., "under Rule 65(a)(2) - that the hearing on the preliminary injunction be consolidated with trial on the merits. . . ."[4] (R 14, p. 20).

Again, contrary to the assertion by Petitioners (Pet - 5), there were no "numerous off-the-record discussions." The entire colloquy is set out at (R 14, pp. 20-34). After Kline filed his answer and counterclaim, to which he endorsed his demand for jury trial, the Petitioners filed their Motion to Strike Case from Jury List, which motion was heard by the court on April 20, 1970. The entire colloquy is set out at (R 15) and affirmatively shows, by virtue of the argument by William B. Rush, Esq., attorney for Kline, there were absolutely no off-the-record statements made by Mr. Dolan on March 25. And, as stated by Mr. Rush, there was no indication that during the earlier hearings, the question of jury trial, as opposed to a peremptory hearing consolidating the application for injunction with the merits for purposes of a preliminary injunction under Rule 65(a)(2), Fed. R. Civ. P., had ever been waived or even discussed, particularly in view of the fact that the time for filing the Answer had not yet arrived under Rule 38, Fed. R. Civ. P.

On March 25, the trial judge had advised counsel that he would take up Mr. Dolan's suggestion ::— under Rule 65(2)(2) — that the hearing on the preliminary injunction be consolidated with trial on the merits . . ."

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[4] Fed. R. Civ. P. 65(a)(2) provides that after the commencement of a hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with a hearing of the application. *The rule further provides that this provision shall be so construed and applied as to save to the parties any rights they may have to trial by jury.*

Judge Timbers went on to say ". . . I think it would be in the interest of everybody concerned to set this down for trial on the merits *with everyone's rights preserved* . . ." (R 14, pp. 20-21). He further stated: ". . . one of the reasons I had suggested this Rule 65(a)(2) procedure was to possibly eliminate some discovery. . ." (R 14, p. 23).

3. The Answer and Counterclaim

By his answer, Kline denied that he claimed his property interest by virtue of the Employment Contract alleged in the Complaint. (R 53). He also denied that he was guilty of the matters alleged. By his Counterclaim, he claimed an interest in the Florida property, basing same upon an Assignment of Option which was "signed, sealed and delivered" to him by the Petitioners and he sought perfection of that interest through the vehicles of either constructive trust or specific performance. (R 53). He also claimed punitive damages arising out of an independent tort perpetrated upon him by the Petitioners in that they had sought to steal his property interest from him by discharging him from their employment after he had served their purposes by finding a tenant for the real estate in question. (R 53). In addition to the legal punitive damages claim, he also sought legal compensatory damages arising out of the Petitioners' breach of the employment contract and the failure of the Petitioners to pay to him lease receipts emanating from Mrs. Heyman's lease of the Florida real estate. She had executed the lease a few days after discharging him.) (R 53).

4. Reply to Counterclaim Filed by Petitioners

By their Reply to Kline's Counterclaim, Petitioners admitted that Mrs. Heyman had executed and delivered

the Assignment to Kline. (R 65, paragraphs 5, 6). They also admitted that Kline had paid for his interest in the property on the dates alleged in accordance with his obligation. (R 65). They admitted the execution of Kline's Employment Contract which occurred after the delivery of the Assignment of Option, which contract recognized and confirmed that Kline had "opted" to acquire a 15 percent share in the Tampa real estate and be a 15 percent partner therein. (R 65). The contract, which Petitioners admitted, also provided that with regard to any other real estate transactions, Kline would be a 15 percent partner if he so elected. (R 53, Exhibit G). As their first affirmative defense, the Petitioners alleged that Kline was not entitled to enforce any obligations against the Plaintiffs because he had breached the employment contract. However, there was no allegation just what legal relationship, if any, the Employment Contract bore to the Assignment of Option.

5. The Trial

Throughout the trial there existed a factual issue as to what exactly constituted the "contract" between the parties. During the trial, Petitioners, through Samuel J. Heyman, attempted to prove by parol evidence that although he had been willing to recognize Kline's 15 percent interest in the property, as well as his participation in the business venture, such was *conditioned* upon his Employment Agreement and that he advised Kline that at some *appropriate* time he would give him some type of agreement which would embody those conditions. (R 16, pp. 156-158). Objections, premised upon the parol evidence rule, by Kline's counsel were overruled by Judge Timbers. In colloquy between the court and counsel, Kline's counsel stated that Kline

had denied that he claimed a property interest (as distinguished from a partnership interest) by virtue of the employment contracts, that he claimed his real estate interest by virtue of the Assignment of Option.[5] The court agreed with Petitioners' counsel who had argued that Kline, by denying that he claimed a property interest by virtue of the Employment Contract, could not frame the issues to suit his convenience.

The Assignment of Option (R 53, Exhibit F) shows on its face that it was "signed, sealed and delivered" by Mrs. Heyman. This was admitted by her in the Reply to the Counterclaim. At the trial, Respondent proved that Samuel J. Heyman paid for his interest, 28 percent, in the same fashion that Kline was paying for his 15 percent. All payments were up to date. However, the trial court ruled that there had never been any delivery of the Assignment and therefore dismissed all of Kline's claims, including his claim to a 15 percent interest in the property.

THE DECISION OF THE COURT OF APPEALS

1. Kline Did Not Waive Jury Trial

At the time of the March 25 conference, Kline still had not filed his answer because it was not yet due. Accordingly, he was entitled to demand a jury trial unless he himself had waived the right or his attorney had waived the right after being authorized by Kline to do so. It was clear that no such waiver occurred. The Court of Appeals specifically noted that the District

[5] At this point in the hearing there was no indication that the Petitioners, contrary to their admission of execution and delivery of the Assignment (Summary of Proceeding, paragraph 4, *supra*) would attempt to prove that Mrs. Heyman did not deliver the Assignment to Kline.

Judge evidently thought that the proceedings were equitable in nature because he said, "if you are talking about Rule 65 proceedings, you are talking about equitable proceedings," and therefore there is no right to a jury trial. However, the court noted, though Rule 65(a)(2) does deal with the consolidation of a hearing for a preliminary injunction with trial on the merits, the rule specifically states "this subdivision (a)(2) shall be so construed and applied as to save the parties any rights they may have to trial by jury." 456 F.2d at 130. Finally, the court stated that "agreement to a consolidation of trial on the merits with a hearing for a preliminary injunction by itself in no way amounts to a waiver of the right to jury trial." 456 F.2d at 130.

2. Factual Questions Common to Legal and Equitable Claims Must be Decided by the Jury in Order to Preserve the Integrity of the Seventh Amendment Guarantee

The Court of Appeals specifically noted the Court's concern in this type case about the *res judicata* or collateral estoppel effect of a prior determination of an equitable claim upon questions common to a legal claim, citing *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 510-511; *Dairy Queen, Inc. v. Wood,* 369 U.S. 469, 472-473 (1962). In this regard, the court noted that counsel for Mrs. Heyman had stated (during oral argument) that in the event the court found error in the District Court's denial of Kline's demand for a jury trial, she agreed to waive all collateral estoppel effect of the District Judge's determination of the equitable claims with respect to the legal claims which must be retried. 456 F.2d at 130. However, the court observed, Kline did not make any such waiver. The court stated:

"In waiving the collateral estoppel effect of the determination of the equitable claims, Mrs. Heyman can dispose of only her own interest. But among other things, the doctrine of collateral estoppel rests 'firmly on the need to avoid conflicting adjudications (involving the same parties). . . . If possible, the same parties should not be subject to conflicting determinations on the same point, both of which are binding.' (citations omitted). In this respect, Kline has a substantial interest in the collateral estoppel effect of the the determination of the equitable claims under the employment contracts; yet, he has not entered any waiver. And even putting aside whatever interest Kline may have, this court, in furtherance of its responsibility to preserve the integrity of the judicial process, has a substantial concern in the consistent determination of any particular question. Were we to remand only the legal claims, we would create a situation ripe with the possibility of inconsistent determinations of the same question. Consequently, we conclude that all claims and counterclaims—both legal and equitable—must be remanded for retrial." 456 F.2d at 131

The court observed that, upon retrial, the jury's verdict will control whether Mrs. Heyman is entitled to any equitable and declaratory relief. The jury's determination of whether Kline breached his employment contracts and whether the Assignment of Option was effective, will lead to the eventual disposition of the equitable claims.

REASON FOR DENYING THE WRIT

Contrary to the assertion of Petitioners (Pet - 8), there is no confusion surrounding the issue of civil jury trial entitlement in the federal courts. Such has been made abundantly clear by the Court in *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500 (1959), *Dairy Queen, Inc.*

v. Wood, 369 U.S. 469 (1962), and *Ross v. Bernhard,* 396 U.S. 531 (1970). It is indeed difficult to equate "overkill" and "Pavlovian response" (Pet - 9) with the Seventh Amendment guarantee to the right to trial by jury. The law review articles cited by Petitioners hardly cause confusion in the decisions enunciated by this Court, *supra.*

1. Kline Did Not Waive His Right to Trial by Jury (Petitioners' Point (1), Pet - 9)

There is no record or factual foundation for Petitioner's assertion that the "learned trial judge [relied] on the words and actions of retained counsel in finding an effective jury trial waiver." (Pet. - 9). As noted by the Court of Appeals, 456 F.2d at 127-129, Judge Timbers suggested that the parties agree to the use of the Rule 65(a)(2) F. R. Civ. P. procedure by which trial on the merits could be consolidated with a hearing on a preliminary injunction. He also suggested that the contempt motion be heard on the same date. And, during the hearing on the Motion to Strike the Demand for Jury Trial, Judge Timbers stated, "[I]f there had been any basis for claiming a jury trial, it seems to me then (March 25) and there was the time to say so. If you are talking about Rule 65 you are talking about equitable proceedings. . . . [T]here was—to me anyway—a clean and unequivocal agreement to try this case to the court without a jury as to all issues." 456 F.2d at 128-129. The "basis for claiming a jury trial" is the Seventh Amendment as reflected in Rule 38, F.R.Civ.P. In the absence of a statement by Kline or his counsel that he waived a jury trial "as to all issues," the Court of Appeals was correct in disagreeing with Judge Timbers.

> "[M]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt,* 293 U.S. 475, 486 (1935). 456 F.2d at 129

Moreover,

> "[T]he right of jury trial is fundamental [and] courts [must] indulge every reasonable presumption against waiver." *Aetna Insurance Co. v. Kennedy,* 301 U.S. 389, 393 (1937). 456 F.2d at 129

The court observed that the colloquy with Judge Timbers occurred prior to the time that Kline was required to demand a jury trial under Rule 38, F.R.Civ.P. Thus,

> "[T]he nature of all the issues in the case could not have been known at the time of the March 25 conference. Kline was entitled to a jury trial on his Counterclaim which alleged that Mrs. Heyman had breached the employment contract by discharging him without cause as well as on his claim for punitive damages. See *Beacon Theatres, Inc. v. Westover* . . ." 456 F.2d at 130.

2. Kline's Right to Jury Trial of All Factual Issues Common Both to Legal and Equitable Claims Follows From the Decisions of this Court and Does Not Conflict With Any Federal Policy or Question. (Petitioners' Points (2) and (3), Pet - 9).

Petitioners' Point (2) would appear to manifest a misconstruction of *Beacon Theatres, Inc. v. Westover* and *Dairy Queen, Inc. v. Wood, supra.* Seemingly, Petitioners argue that Kline's right to jury trial should be limited to damages on the issues of breach of contract

made by each side, and that the prior determination by Judge Timbers that Kline had no interests in the property in question should be final. However, a jury, subsequently impanelled to try damages, might determine that Kline had not breached his employment contract, thus precluding the Petitioners from recovering damages against him. This jury determination would be inconsistent with the determination by Judge Timbers that Kline had no interest in the real estate because he had breached the contract. And, to carry the example to its logical end, were the jury to find that the Petitioners had breached their contract with Kline, thereby awarding damages to Kline against the Heymans, the inconsistency would be magnified.

Moreover, assuming that the Court of Appeals had merely reversed the District Court on the issue of jury trial with regard to the breach of contract rights allegedly emanating from the employment contracts, while affirming on the issue of the Assignment of Option, the trial judge would be on the horns of a dilemma. Thus, the Employment Contract recognizes that Kline had "opted" to participate in the Tampa venture. (R 53, Exhibit G). He would testify to the jury that he paid for his interest in the property at the time that Mrs. Heyman "signed, sealed and delivered" to him the Assignment of Option. Thus, the Assignment would become a relevant item of evidence even though the trial judge had previously ruled during non-jury proceedings that it was ineffective for lack of delivery. In the light of such evidence, the jury might find it difficult to find against Kline and, in the words of the Court of Appeals, such "would create a situation ripe with the possibility of inconsistent determinations of the same question. Consequently, we conclude that all claims and counter-

claims—both legal and equitable—must be remanded for retrial." 456 F.2d at 131[6]

Thus, in ruling that Kline was entitled to jury trial of all factual issues common to both legal and equitable claims, the Court of Appeals recognized that Judge Timbers' determination of the delivery issue as to the Assignment of Option might operate either by way of *res judicata* or collateral estoppel so as to conclude both parties with respect thereto at the subsequent jury trial of the damages claim. See *Beacon Theatres v. Westover, supra,* 359 U.S. at 504. And, the Court of Appeals merely followed the mandate of *Beacon Theatres* in ruling that disposition of the equitable claims must follow the jury trial of common factual issues inasmuch as a prior determination of the equitable issues would have the same effect as an equitable injunction of the legal claims. *Beacon Theatres, supra,* 359 U.S. at 507.

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[6] The Court of Appeals also held that the District Court's TRO enjoining Kline and his counsel from filing suit in Florida was improperly issued. *Kline v. Burke Construction Co.,* 260 U.S. 226 (1922). Kline and his counsel withdrew the Florida lawsuit only upon further pain of contempt, after Judge Timbers entered his interlocutory order directing that the suit be withdrawn. ——— F.Supp. ———. Thus, by the time that the decision of the Court of Appeals was rendered, two years had elapsed, during which time Kline had been improperly denied his right to litigate the issues in Florida. Had the Court of Appeals upheld the finding of the District Court on the issue of delivery of the Assignment of Option, the Petitioners would have gained some rights which arose from the issuance of the invalid TRO. (In this regard, Petitioners accept the decision of the Court of Appeals for they do not contest it.) The special defenses and counterclaim were filed only after the Florida suit had been withdrawn and in accordance with the injunction of the District Court. Had the Court of Appeals affirmed the action of the District Court, it would have sanctioned the District Court's accomplishment by indirection of that which it could not do directly through the issuance of the invalid TRO. In short, Kline had been denied his right to have the opportunity to have the issue of the assignment litigated in the Florida courts.

Finally, the Petitioners and Kline disputed the basis for the latter's property interests. Kline contended that his property interest (as distinguished from his partnership interest) had its basis in the Assignment of Option as corroborated by the Employment Contract which recognized that he had opted to participate in the venture, whereas the Heymans claimed that his property interest arose solely out of the Employment Contract.[7] By his answer to the Petitioners' Complaint, Kline denied that he claimed a property interest arising out of the Employment Contract whereas, by their Reply to Kline's Counterclaim, the Petitioners admitted execution and delivery of the Assignment of Option (although they later asserted at trial that it had never been delivered). Again, by its decision, the Court of Appeals followed this Court's mandate in *Dairy Queen, Inc. v. Wood, supra,* 369 U.S. at 479 (1962) that:

> ". . . such a defense goes to the question of just what, under the law, the contract between the respondents and petitioner is and, in an action to collect a debt for breach of a contract between these parties, petitioner has a right to have the jury determine not only whether the contract has been breached and the extent of the damages if any *but also just what the contract is.*" (Emphasis supplied)

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[7] In the Employment Contract, there are no words of conveyance of the property whereas such appear in the Assignment of Option. (R 53, Exhibit F). Moreover, the Employment Contract did not comply with the Statute of Frauds for purposes of enforceable contracts whereas the Assignment did. That is to say, the latter constituted a written promise signed by the party to be charged and, in addition, it was acknowledged and witnessed for purposes of recordation. Finally, whereas there was no exchange of money at the time of the execution of the Employment Contract, Kline paid money for his interest at the time of the delivery of the Assignment.

Petitioners' question (2) incorporates two faulty premises. First, the issues are not "basically equitable" in the law-equity merger context. *Beacon Theatres v. Westover; Dairy Queen v. Wood, supra.* Secondly, the legal claims are hardly "tenuous." Kline's legal allegations of breach of contract are traditional common law claims which contest the very basic breach of contract theories advanced by Petitioners. Kline's claims for punitive damages are well recognized common law theories.[8]

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[8] See *Brown v. Coates*, 253 F.2d 36 (D.C. Cir., 1958), Opinion by Burger, Judge, now Chief Justice. The D. C. Circuit Court affirmed judgments of compensatory and punitive damages against a real estate broker who had induced home owners to enter into a contract with him for exchange of their old house for a new one with the resulting effect that the homeowners received no money for their equity in the old house. Judge Burger, writing for the court, stated that the broker breached his fiduciary duty under circumstances wherein the victim of his tort had a right to rely upon his competence, honesty and good faith. Breach of trust warranted assessment of punitive damages as punishment of, and as a deterrent to the tortfeasor's wrongful behavior, citing *Woodward v. Ragland*, 1895, 5 App. D. C. 220; *Wardman-Justice Motors, Inc. v. Petrie*, 1930, 59 App. D. C. 262, 39 F.2d 512, 69 ALR 648; *Mills v. Levine*, 1956, 98 U.S. App. D. C. 363, 14 L.Ed. 181; *Scott v. Donald*, 1896, 165 U.S. 58, 17 S.Ct. 265, 41 L.Ed. 362; *Greene v. Keithley*, 8 Cir., 1936, 86 F.2d 238; *Scalise v. National Utility Service, Inc.*, 5 Cir. 1941 120 F.2d 938; *Reynolds v. Pegler*, 2 Cir. 223 F.2d 429, certiorari denied, 1950, 350 U.S. 846, 76 S.Ct. 80, 100 L.Ed. 754. See also 22 Am.Jur.2d. Damages, §245, .p 337. Herein, Samuel Heyman testified at trial that he had agreed to recognize Kline's interest and to deliver an appropriate deed. (R 18, pp. 419-420). Mrs. Heyman recognized that Kline had brought the lease tenant to the Heymans and because of the employment contract (which corroborates delivery of the earlier Assignment), she agreed to pay him a commission. (R. 116, Exhibit G). The Petitioners' own lawyer, Mr. Marcus, testified to correspondence which corroborates the interest. (R 18, p. 418; R 115, 28A). On August 13, 1968, Mrs. Heyman exercised the option (which was the basis of her assignment to Kline (15 percent), herself (29 percent), Samuel Heyman (28 percent), and Abigail (Weiner) Heyman (28 percent). By her letter exercising the option, Mrs. Heyman advised the optioner that her deceased husband's estate has *assigned* the decedent's option to

Therefore, it is respectfully submitted that Petitioners' question fails to raise a question envisaged by Supreme Court Rule 19 and certiorari should be denied.

3. The Court of Appeals' Decision Followed the Court's Prior Rulings That in a Cause Involving Both Legal and Equitable Claims, with Factual Issues Common to Both, the Equitable Relief Must Follow the Jury Determination of the Factual Issues Because, to do Otherwise, Might Operate Either by Way of Res Judicata or Collateral Estoppel so as to Conclude Both Parties With Respect Thereto at the Subsequent Jury Trial of Their Damage Claims. ***Beacon Theatres, Inc. v. Westover; Dairy Queen v. Wood, supra.***

By their Point (3) Pet-9), Petitioners manifest confusion in asking if there is a federal policy so favoring trial by jury that it limits developments in the law of *res judicata* and collateral estoppel. There are no aspects of *res judicata* and collateral estoppel which require "developments." Petitioners' interrogatory begs the question. Very simply, the federal policy is to grant a jury trial on factual issues common to legal and equitable claims.

> "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies. At least as much is required to justify a trial court in using its discretion under the Federal Rules to allow claims of equitable

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her personally. (R 115, Exhibit G). On January 10, 1969, the proposed tenant advised that he would sign the lease within 10 days. Seven days later, Mrs. Heyman verbally (through her son, Samuel Heyman) discharged Kline and, on February 1, 1969, she executed a $5,000.00 lease to his exclusion. Obviously, such conduct does not amount to an "ambiguous" or "tenuous" claim as Petitioners suggest. (Pet 7, 12, footnotes 2, 3).

origins to be tried ahead of legal ones, since this has the same effect as an equitable injunction of the legal claims." *Beacon-Theatres, Inc. v. Westover,* 359 U.S., *supra,* at 506-507.

Thus, it may be observed that the doctrines of *res judicata* and collateral estoppel, in a mixed equity-legal context, have relevance only insofar as the mechanism of trial is concerned. By virtue of the Seventh Amendment entitlement and guarantee to jury trial, the Court has stated in no uncertain terms that, inasmuch as there is no similar guarantee with regard to non-jury trials, the jury trial must precede the disposition of equitable claims, because, to do otherwise, would impair the right to jury trial by virtue of the dictrines of *res judicata* and collateral estoppel. The Court of Appeals observed its "responsibility to preserve the integrity of the judicial process" because "[W]ere [it] to remand only the legal claims, [it] would create a situation ripe with the possibility of inconsistent determinations of the same question. Consequently, [it] conclude[d] that all claims and counterclaims—both legal and equitable—must be remanded for retrial." 456 F.2d at p. 131.

Although Petitioners choose to argue in the abstract, a factual analysis is more appropriate for purposes of the Petition when deciding whether or not the Court has before it an important question of federal law which has not been, but should be, settled by the Court. Supreme Court Rule 19. Mrs. Heyman, in suggesting to the Court of Appeals that she would waive collateral estoppel effects for purposes of the damages trial is very simply saying that she is willing to trade the risk of a jury trial on damages in return for Judge Timbers' determination that her freely executed and delivered Assignment of Option which Kline paid for, was of no force and effect. To put it another way, she suggests

that she is willing to gamble that there is more at stake with regard to the property interest than with regard to a jury trial on damages.

The Court of Appeals properly made short shrift of Mrs. Heyman's offer for the simple reason that the doctrines of *res judicata* and collateral estoppel within this context have relevance only for purposes of consistent and inconsistent jury determinations. *Beacon Theatres, Inc. v. Westover, supra.* The Court of Appeals easily perceived the true relevance of the doctrines when it recognized that "[I]n waiving the collateral estoppel effect of the determination of the equitable claims, Mrs. Heyman can dispose of only her own interest. But among other things, the doctrine of collateral estoppel rests firmly on the need to void conflicting adjudications (involving the same parties). . . . If possible, the same parties should not be subject to conflicting determinations on the same point, both of which are binding. (Citations omitted). In this respect, Kline has a substantial interest in the collateral estoppel effect of the determination of the equitable claims under the employment contracts; yet, he has not entered any waiver. And even putting aside whatever interests Kline may have, this court, in furtherance of its responsibility to preserve the integrity of the judicial process, has a substantial concern in the consistent determination of any particular question . . ." 456 F.2d at 131

Thus, to answer Petitioners' Point (3) (Pet-9), the Court will readily observe that it need not answer the question at all for the reason that it has no relevance to the doctrines of *res judicata* and collateral estoppel for purposes of consistent determinations in mixed law-equity proceedings. The Court of Appeals has insured consistent determinations by reversing the cause and

ordering that a jury trial on the common factual issues must precede determination of equitable claims. Under the federal Rules, the same court may try both equitable and legal causes in the same action. F.R.Civ.P., 1, 2, 18. Thus, the claims by the Petitioners that they did not have an adequate remedy at law and that they will suffer irreparable harm are equitable matters which "must be determined, not by precedents decided under discarded procedures, but in the light of the remedies now made available by the Declaratory Judgment Act and the Federal Rules." *Beacon Theatres, Inc. v. Westover, supra,* 359 U.S. at 507. Contrary to Petitioners' assertion as well as that of the dissenting judge in the Court of Appeals, Rule 42(b) F.R.Civ.P. may not be utilized to deprive Kline of a full jury trial on his defenses and counterclaim.[9] For to do so would recog-

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[9] It is difficult to understand Petitioners' assertion, as well as that of the dissenting judge below, that the issue of delivery of the assignment of option should be decided by the court, sitting without a jury. "[W]hether a deed has in fact been delivered is for the jury to decide, unless proof is so complete and undisputed that a verdict is demanded thereunder for one or the other party." *Thompson Real Property* (1963 Replacement Ed.) §4228. In Connecticut, it is well settled that where there is conflicting testimony on the issue of delivery, the court will afford a right to a jury trial on that issue. *Bell v. Bloom*, 146 Conn. 307, 150 A.2d 300 (1959). See also *Lomartia v. Lomartia*, 159 Conn. 558, 271 A.2d 91 (1970), (issue of delivery is for the tryer of fact). In addition, as Kline claims title by virtue of the assignment, the action would be accorded at jury trial under the Connecticut law. *National Bank of Commerce v. Howland*, 128 Conn. 307, 22 A.2d 773 (1941). In *Byrd v. Blue Ridge Rural Electric Coop.*, 356 U.S. 525 (1958), the Court noted the existence of "the federal policy favoring jury decisions of disputed fact questions" and indicated that under the doctrine of *Erie v. Tompkins*, 304 U.S. 64 (1938), the federal courts should conform to state rules in the absence of other considerations. In *Byrd, supra*, the Court held that the federal court favoring as it did a trial by jury, granted a jury trial even though the state law would require a decision by the court. In the present case, Judge Timbers' decision to deny a jury trial in a federal court where one would have existed in the state court violates the federal rule pertaining to jury trial on the

nize pre-merger law and equity principles rather than merger principles recognized and enunciated by the Court. *Bacon Theatres v. Westover, Dairy Queen v. Woods, supra.* See also *Ross v. Bernard,* 396 U.S. 531 (1970).

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issue of delivery of the Assignment. Obviously, the District Court should have granted a trial by jury as to the issue of the execution and delivery of the assignment of option. See *Meeker v. Ambassador Oil Corp.,* 375 U.S. 160 (1963).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should deny the Petition for Writ of Certiorari filed in this case.

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